

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Petition Of United Parcel Service Co.
To Institute A Public Inquiry Into The

**Citizenship and Foreign Control
Of DHL Airways, Inc.**

Docket OST-2002-13089

**EMERGENCY MOTION
OF FEDERAL EXPRESS CORPORATION
FOR RESCISSION**

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March 26, 2003

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On March 25, 2003, DHL Worldwide Express¹ (DHLWE) announced that it has reached a merger agreement with Airborne, Inc. (Airborne), parent company to U.S. air carrier and certificate holder, ABX Air, Inc. (ABX).² This agreement appears to rely upon a May 2002 opinion by the Department's staff that a similar structure meets U.S. citizenship requirements. Since that opinion is the subject of a separate review and has been heavily criticized, FedEx Express respectfully requests the Department to rescind the opinion and clarify that no one may rely upon it as precedent pending that review.

Under the terms of the merger agreement, DHLWE will acquire Airborne's ground operations and combine them with the existing DHLWE U.S. operations to operate under the DHL brand. Airborne's air operations will be separated from its

¹ It is not clear at this time which DHLWE company is the actual acquiring company in the transaction. All public information refers simply to the acquirer as "DHL."

² Exhibit 1, Airborne/DHL transaction summary at 5. According to this summary, ground operations refer to all non-airline related activities of Airborne, Inc.

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ground operations and will become a company called ABX Air, Inc. (New Airco). New Airco will be publicly owned by Airborne's current shareholders, although its stock will not be listed on any major national exchange, unlike Airborne's NYSE listing. New Airco will enter into ACMI agreements to provide air transportation for DHLWE/Airborne's package and freight business. DHLWE/Airborne will control Airborne's hub, line-haul, and maintenance services and will compensate ABX on a "cost plus basis to cover ABX Air's costs."³

This transaction is structured to take advantage of the Department's informal review of similar contractual arrangements between DHLWE and DHL Airways, Inc. (DHL Airways). That informal review, however, has been challenged in proceedings before the Department, which are pending. Further, the informal review resulted in an opinion by a Department official that has not been adopted by the Department. Finally, as the Inspector General has found, there are serious concerns about whether that informal review and opinion are consistent with Department precedent, as a matter of both substance and procedure, and therefore lawful.

In a conference call and webcast held on March 25 to inform the investing public about the proposed transaction, Airborne and DHLWE revealed that there had been prior consultation with the Department. According to Carl Donaway, planned CEO of the joint ground companies, on that conference call:

³ Exhibit 1 at 7.

So, ABX Air, Incorporated is going to be completely separate, so we don't think that there's any issue at all in terms of foreign ownership as a result of this transaction. But as you would suspect, we have discussed this with the Department of Transportation; we've shown them the materials and the structure, and I can't speak for the Department of Transportation, but I can say — I don't believe that there will be an issue.

In light of the contested issues pending in this proceeding, their apparent relationship to the proposed DHLWE/Airborne transaction, and their importance to the strategic plan of Deutsche Post/DHL to gain unlawful access to the U.S. market, these communications raise serious concerns.

The Department should appreciate the significance of these developments. U.S. carriers have no reciprocal access to foreign markets.⁴ The Department should not allow itself to be used by a foreign postal monopoly to gain unilateral, unlawful access to the U.S. market.

FedEx Express therefore moves, on an emergency basis, that the Department rescind the informal opinion of the Assistant General Counsel dated May 7, 2002 that

⁴ Comments of FedEx Express at 2-3, Docket OST-2002-13089-38 (March 19, 2003).

DHL Airways met U.S. citizenship requirements, and clarify that neither DHLWE nor any other person may rely upon it as precedent for any other transaction.

Respectfully Submitted,

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Certificate of Service

I hereby certify that I have this 26th day of March, 2003 caused the foregoing Comments of Federal Express Corporation to be mailed to each party listed below by first class mail, postage prepaid.

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